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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

ALLY FINANCIAL INC., Plaintiff, Cross-defendant and Respondent, v. ANGELA C. LAZROVICH et al., Defendants and Cross-complainants; PATRICIA TRUJILLO et al., Objectors and Appellants.	H041197 (Santa Clara County Super. Ct. No. CV195659)

I. INTRODUCTION

This appeal arises from the trial court's April 29, 2014 final order and judgment approving and incorporating a class action settlement in which respondent Ally Financial Inc. (Ally) resolved the claims of a class of persons, including appellants Patricia Trujillo and Joseph Riley, who had defaulted on their auto loans and had their automobiles repossessed by Ally. The class action cross-complaint included the allegations that Ally was barred from collecting the class members' deficiency balances on their auto loans because Ally's notices of intent to dispose of a repossessed motor vehicle did not include all of the statutorily mandated disclosures.

On appeal, we understand Trujillo and Riley contend that the judgment should be reversed because the class notice regarding the proposed class action settlement failed to disclose to the class members that they would incur federal income tax liability as a result of Ally's agreement to forgive their auto loan debts. Trujillo and Riley also contend that class members should not have been required to release their unknown claims against Ally without Ally admitting liability. In addition, we understand Riley to contend that the trial court erred in denying his request to opt out and be excluded from the class. For the reasons stated below, we find no merit in these contentions and we will affirm the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Pleadings*

In March 2011 Ally filed a complaint against Angela C. Lazrovich alleging that she had defaulted on her auto loan. Ally further alleged that Lazrovich owed a deficiency balance of $28,400.98, which was the loan balance that remained after Ally had repossessed and sold her automobile. Ally sought a judgment in the amount of the deficiency balance plus attorney's fees and costs.

Lazrovich responded by filing a class action cross-complaint against Ally in April 2011. In the first amended cross-complaint (hereafter, cross-complaint) Lazrovich and two other named cross-complainants, Bobby Jackson and Pamela Jackson, asserted that they did not owe a deficiency balance because Ally's notice of intent to dispose of a repossessed motor vehicle (NOI) was defective. Specifically, they claimed that the NOI was defective because it did not include all of the disclosures mandated by the Automobile Sales Finance Act (Rees–Levering Act),[1] Civil Code sections 2983.2 and 2983.8).[2]

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[1] "The [Rees-Levering] Act provides detailed rules governing motor vehicle conditional sale contracts . . . . ([Civ. Code,] § 2981 et seq.; [citation].) The Act's (continued)

Cross-complainants further asserted that they brought a class action against Ally pursuant to Code of Civil Procedure 382 on behalf of themselves and all other persons similarly situated. The causes of action in the cross-complaint included (1) violation of the Rees-Levering Act, section 2981 et seq.; (2) violation of Business and Professions Code section 17200 et seq; and (3) conversion. The remedies sought included class certification, declaratory relief, injunctive relief, damages, and attorney's fees. In addition, cross-complaints sought an order requiring Ally to "send a letter to each of the credit reporting agencies instructing them to delete all references to the trade lines[3] of class members, including, but not limited to any reference to repossessions, deficiency balances allegedly owed, and/or charge-offs of such balances."

B. *The Proposed Class Action Settlement*

The parties entered into a proposed class action settlement that defined the settlement class as "all persons: [¶] (a) who purchased a Motor Vehicle in California under a Conditional Sale Contract and whose contract was assigned to Ally, [¶] (b) whose Motor Vehicle was repossessed or voluntarily surrendered to Ally, [¶] (c) who were issued an NOI by Ally between March 4, 2007 and August 2, 2011; and [¶] (d) against whose account a Deficiency Balance was assessed."

The trial court's June 18, 2013 order certified the settlement class; preliminarily approved the class action settlement; approved the notice of proposed class action settlement and the claim form that were attached to the settlement agreement; set a final

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purpose is 'to provide more comprehensive protections in financing for the unsophisticated motor vehicle consumer.' [Citations.]" (*Ramirez v. Balboa Thrift & Loan* (2013) 215 Cal.App.4th 765, 778.)

[2] All further statutory references are to the Civil Code unless otherwise indicated.

[3] "A trade line, also spelled as tradeline, can include a mortgage, line of credit, credit card, or any other credit-related item that is provided by a financial institution or lender." (Investopedia <http://www.investopedia.com/terms/t/trade-line.asp#ixzz4BhBB50ti> [as of Sept. 9, 2016].)

approval hearing; and also set a deadline of September 25, 2013, for the settlement class members to either object to the settlement or request exclusion from the class.

The notice of proposed class action settlement (hereafter, the class notice) summarized the benefits of the settlement for class members: "After diligent investigation of its records, Ally affirms that as of August 1, 2012, there are approximately 16,943 members of the Settlement Class, whose deficiency balances total approximately $173,353.175. However, as part of this settlement, Ally will forgive and stop all efforts to collect the remaining deficiency balances . . . . [¶] . . . Ally agrees not to pursue collection of any deficiency balance remaining after the sale of the repossessed vehicles which are the subject of the Action. This means Ally cannot collect any additional money from Class Members on these accounts. In addition, the Court will enter an injunction, enjoining Ally from collecting Class Members' deficiency balances. Ally will also instruct the credit agencies to delete the tradelines for all Class Members' Accounts. . . . [¶] . . . [¶] . . . If you are a Class Member who paid all or some of a deficiency balance after repossession, you will receive the non-monetary benefits described above, **and in addition,** you will receive an 80% refund of the amount you actually paid toward your deficiency balance."

Regarding tax consequences, the class notice stated: "<u>Tax Consequences of Settlement: Any benefits you receive may or may not be the subject of state or federal taxation, depending on your circumstances. Class Counsel are not tax attorneys and you are advised to seek separate legal advice on matters of taxation</u>."

The class notice also provided information about the settlement release: "In exchange for the benefits described herein, every Class Member gives Ally a Release and agrees to be bound by all court orders in the Action. You will be bound by the terms of the Settlement, once it is final. **A release means you can't sue or be part of any other lawsuit against Ally about the claims or issues in *this* Action ever again**."

As to the class members' right to request exclusion from the proposed settlement or to object to the settlement, the class notice stated in part: "If you are a Class Member, you are included in the Settlement, unless you request to be excluded. . . . If you do not want to participate in the settlement, you can exclude yourself or 'opt out.' If you exclude yourself, you will not receive any benefits of the Settlement, but you will not be bound by any judgment or release in this Action and will keep your right to sue Ally on your own if you want. If you exclude yourself, you may not object to the Settlement. [¶] . . . [¶] If you do not request to be excluded, you may object to the Settlement. You may not do both." The class notice also included the directions for sending a written objection or request for exclusion to "the Class Counsel, Ally's Counsel, and the Class Administrator" by the postmark deadline of September 26, 2013.

The record reflects that Trujillo filed a timely claim form and was determined by the claims administrator to be entitled to 80 percent of $5,800 if the settlement was approved. Riley does not dispute Ally's assertion that he also filed a timely claim form.

C. *Motion for Final Approval of Class Action Settlement*

In January 2014 class counsel filed a motion for final approval of the class action settlement, contending that all of the relevant factors weighed in favor of final approval. Among other factors, class counsel argued that "the class has achieved nearly all the relief it could have obtained had it gone to trial and prevailed on the merits." Class counsel also advised the trial court that no objections to the settlement had been received and only two members of the class (who are not parties to this appeal) had requested exclusion.

On March 6, 2014, Trujillo filed a memorandum of points and authorities in opposition to the motion for final approval of the class action settlement. She contended that the settlement should not be approved for several reasons: (1) the class notice did not inform the class members of the amount of attorney's fees and costs requested by class counsel; (2) the class notice did not inform class members that they were exposed to tax liability because the relevant Internal Revenue Service (IRS) regulations and an IRS private letter ruling indicated that debt cancellation and debt forgiveness constitute taxable income where, as here, the lender did not admit the NOIs were defective; (3) the settlement is unfair because Ally obtained a release of all claims under section 1542 although the class members were left with tax liability; and (4) the settlement requires class members to submit a claim to receive a partial refund.

Class counsel filed a reply to Trujillo's opposition, arguing that the opposition was procedurally barred since it was filed more than five months after the September 2013 deadline for filing an objection to the settlement. Class counsel also argued that the opposition lacked substantive merit, because the class notice adequately advised class members regarding attorney's fees and costs and their right to obtain tax advice. In addition, class counsel asserted that the class notice informed class members about the scope of the release of claims. They also asserted that the claims form process was adequate and yielded "an exceptional payout of 48.49% of the total restitution fund for a full 39.81% of the total number of restitution-eligible class members."

A hearing on the motion for final approval of class action settlement was set for March 25, 2014.

D. ***Riley's Request for Exclusion***

On March 24, 2014, the day before the hearing on the motion for final approval of class action settlement, Riley filed a request "for opt out and exclusion from final approval of class action settlement." Riley stated that he had not requested exclusion sooner because the class notice was inadequate with respect to class members' tax liability for debt cancellation and debt forgiveness. He also stated that on February 18, 2014, "well after the class notice," he and his wife Danielle Riley[4] had

[4] Danielle Riley was included in the request for exclusion as a "putative class member." However, she is not a party to this appeal.

"received a 1099-C notification from the Internal Revenue Service assessing $767.00 in additional taxes based upon Ally Financial/GMAC filing of a 1099-C 'cancellation of debt'."[5] The trial court denied Riley's request for opt out and exclusion during the hearing on the motion for final approval of class action settlement that was held on March 25, 2014.

E. *Final Order and Judgment*

The trial court's revised final order and judgment was filed on April 29, 2014. The order states that the trial court found the settlement agreement to be "fair, adequate, and reasonable" and provides that the final judgment incorporates the settlement agreement. The court also found that class counsel and the named plaintiffs had adequately represented the interests of the class; the class was appropriate for certification for settlement purposes; and the class notice constituted the best notice practicable and was in full compliance with due process and the California Rules of Court.

The trial court further ordered that the settlement agreement would be implemented; the settlement class members would be deemed to have released all claims against Ally described in the settlement agreement on the date of the final judgment; the settlement class members waived all rights that they might have under section 1542; the action was dismissed with prejudice on the merits; the terms of the settlement agreement

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[5] "An IRS Form 1099 is used to report various types of income—other than wages, salaries, and tips—to the IRS. Such income includes, inter alia, dividends and distributions, interest, government payments, payments to independent contractors, and miscellaneous income." (*U.S. v. Srivastava* (4th Cir. 2008) 540 F.3d 277, 284.) The class action settlement provided that "Ally agrees not to issue Form 1099s to the IRS as to any Settlement Class member in connection with this waiver [of deficiency balances], or in connection with any refund of payments made on Deficiency Balances as set forth herein. Notwithstanding the foregoing, Ally may issue Form 1099s to such Settlement Class Members in the future if it is ordered to do so by the IRS and any such compliance by Ally with an IRS directive shall not be a breach of the Agreement."

and judgment would have res judicata effect; Ally would pay the residue of any uncashed checks to three nonprofit organizations; class counsel were awarded attorney's fees and costs in the amount of $575,000; and incentive payments of $1,500 were awarded to each of the named plaintiffs. The trial court also ruled that "[a]ny and all objections to the settlement and Settlement Agreement are overruled as being without merit."

Trujillo and Riley filed a timely notice of appeal from the April 29, 2014 judgment.

III. DISCUSSION

On appeal, we understand Trujillo and Riley to contend that the judgment should be reversed because the class action settlement is unfair and unreasonable due to the failure of the defective class notice to disclose to the class members that they would incur federal income tax liability as a result of Ally's debt cancellation and debt forgiveness. They also contend that class members should not have been required to give a "full § 1542 release" without Ally admitting that its NOIs were defective. We also understand Riley to contend that the trial court erred in denying his request for exclusion from the class.

A. *Procedural Issues*

As a threshold matter, we first consider the procedural issues raised on appeal by Ally and class counsel. They argue that the appeal should be dismissed because Trujillo and Riley lack standing to appeal and the record is inadequate for appellate review.

Regarding standing to appeal, Ally and class counsel assert that Trujillo and Riley lack standing because they are unnamed class members who have not taken the appropriate steps, such as making a timely objection or intervening, to become a party of record with standing to appeal. However, this court has stated that "[c]lass members who appear at a final fairness hearing and object to the proposed settlement have standing to appeal. [Citation.]" (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.App.4th 224, 235 (*Wershba*).)

In this case, the reporter's transcript for the March 25, 2014 hearing on the motion for final approval of the class action settlement, at which the trial court considered the fairness of the proposed class action settlement, shows that the attorney representing Trujillo and Riley appeared and argued their opposition to the settlement on the ground that the class notice did not adequately inform the class members regarding their tax liability. Accordingly, we determine that under the circumstances of this case, Trujillo and Riley have standing to appeal. (See *Wershba*, *supra*, 91 Cal.App.4th at p. 235.) We recognize that Trujillo and Riley failed to file timely objections. (*Ibid*.) However, the trial court in this case "impliedly found that any untimeliness did not prevent [appellants] from appearing and having [their] objections heard," as did the trial court in *Wershba*. (*Ibid.*) We similarly determine that since Trujillo and Riley were allowed to "present their objections below," they have standing here. (*Ibid.*)

Class counsel also argue that Trujillo and Riley lack standing to appeal because they are not aggrieved parties due to their failure to show during the proceedings below that they will suffer harm as a result of the class action settlement. The California Supreme Court has stated: "One is considered 'aggrieved' whose rights or interests are injuriously affected by the judgment. [Citations.] Appellant's interest ' "must be immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment." ' [Citation.]" (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 737.) We determine that Trujillo and Riley may be considered aggrieved parties because it is arguable that they will be bound by the judgment on the class action settlement that may cause them to be subject to federal income tax liability.

As to the argument that the appeal should be dismissed because Trujillo and Riley did not provide this court with an adequate record, we again turn to this court's prior decision in *Wershba*: "Without, of course, excusing any failure to comply with the [California] Rules of Court, we do not believe that such a drastic sanction is warranted here. [Citation.] We will therefore proceed to the merits." (*Wershba, supra*, 91 Cal.App.4th at p. 237.)

B. *Standard of Review*

The United States Supreme Court has stated: "The class-action device was designed as 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.' [Citation.] Class relief is 'peculiarly appropriate' when the 'issues involved are common to the class as a whole' and when they 'turn on questions of law applicable in the same manner to each member of the class.' [Citation.] For in such cases, 'the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion . . . .' [Citation.]" (*General Telephone Co. of Southwest v. Falcon* (1982) 457 U.S. 147, 155.) The California Supreme Court has noted that " ' "[b]y establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress . . . ." ' [Citation.]" (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.)

As to absent class members, "[u]nder federal and California law, a judgment in a class action is binding on class members in any subsequent litigation, though the ability to bind absent class members depends on compliance with due process regarding notice and adequate representation. [Citations.]" (*Louie v. BFS Retail & Commercial Operations, LLC* (2009) 178 Cal.App.4th 1544, 1555.)

More specifically, the United States Supreme Court has ruled that "[i]f the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' [Citations.] The notice should describe the action and the plaintiffs' rights in it. Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself [or herself] from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." (*Phillips Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 811-812, fn. omitted (*Phillips Petroleum*).)

"In general, questions whether a settlement was fair and reasonable, whether notice to the class was adequate, whether certification of the class was proper, and whether the attorney fee award was proper are matters addressed to the trial court's broad discretion. [Citation.] Our review is therefore limited to a determination whether the record shows 'a clear abuse of discretion.' [Citation.] Our task is not to determine in the first instance whether the settlement was reasonable or whether certification was appropriate. We determine only whether the trial court acted within its discretion in making the rulings that it did. [Citations.]" (*Wershba, supra,* 91 Cal.App.4th at pp. 234-235.) However, "[t]o the extent that it appears the trial court's decision was based on improper criteria or rests upon erroneous legal assumptions, these are questions of law warranting our independent review. [Citations.]" (*Id*. at p. 235.)

C. *Class Notice Regarding Tax Consequences*

The class notice stated: "<u>Tax Consequences of Settlement: Any benefits you receive may or may not be the subject of state or federal taxation, depending on your circumstances. Class Counsel are not tax attorneys and you are advised to seek separate legal advice on matters of taxation</u>."

During the hearing on the motion for final approval of class action settlement, the trial court rejected the argument of Trujillo and Riley that the class notice was inadequate with respect to tax consequences. The trial court stated: "I don't think it's appropriate for counsel in this setting to tell people you will have tax liability and what amount. I think the notice indicating that there could be tax consequences is adequate for purposes of the notice given to the class. I'm sorry, I don't agree with that point." The court later reiterated that "the notice adequately advised the class members that there could be tax consequences and they should consult a tax professional. I think that notice was adequate."

On appeal, Trujillo and Riley contend that the class notice regarding tax consequences violates due process, and is therefore subject to de novo review, because the class notice (1) "failed to disclose that debt cancellation and debt forgiveness are identifiable events under existing regulations, section 1.6050P-1(b)(2) of the Treasury Regulations;" (2) failed to notify class members that "they were giving up the ability to defend themselves from the undisclosed tax liability via the Civil Code §1542 waiver;" (3) "failed to notify the Rileys and thousands of class members that 1099s had been sent by Ally and that they would be receiving a tax bill for Ally's debt cancellation after the deadline for opting out;" (4) "failed to disclose that class members have [a] duty to self report the cancelled debt as income;" (5) "failed to disclosed that per the Settlement Agreement . . . Ally can issue 1099s without notice, and without breaching the settlement, and class members have no recourse because the § 1542 waiver deprives the class of the ability to contest the NOI;" and (6) "[t]he class notice does not inform class members that the settlement is debt cancellation by Ally, it does not inform them of the amount of debt cancellation, nor does it provide information as to where class members could get free [tax] assistance . . . ." Trujillo and Riley also assert that the IRS issued a private letter ruling in October 2012 indicating that debt forgiveness constitutes taxable income where, as here, the class action defendant does not admit liability.[6]

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[6] We deny the motion of Trujillo and Riley for judicial notice of IRS private letter ruling No. 140522-14. The record reflects that the private letter ruling was not provided to the trial court during the proceedings below. "It has long been the general rule and (continued)

Class counsel respond that the class notice regarding tax consequences was sufficient to satisfy due process because the class notice properly advised the class of the possibility of taxation of settlement benefits, avoided giving erroneous legal advice, and gave sufficient information to allow class members to either accept the benefits of the settlement, opt out, or object to the settlement. Class counsel asserts that "details concerning individual Settlement Class Members, and the kind of tax advice [Trujillo and Riley] are demanding would simply be more likely to mislead and confuse the class."

Ally maintains that federal courts have recognized that a more specific warning in class action notices regarding tax liability would cause a risk of confusion, relying on the decision in *In re Ikon Office Solutions* (E.D. Pa. 2000) 194 F.R.D. 166, 188, fn. omitted ["Generic language stating that it is advisable to consult a tax specialist is preferable."] Ally emphasizes that Trujillo did not submit any evidence to show that she or any other class member had been confused or misled by the class notice.

We note that Trujillo and Riley have not provided any legal authority for the proposition that a class action notice must contain more specific information about the potential tax consequences of a proposed class action settlement than was provided in this case, in order to satisfy due process. Our resolution of the issue is therefore governed by the general rules for class notice, as stated by this court in *Wershba*: "In regard to the contents of the notice, the 'notice given to the class must fairly apprise the class members of the terms of the proposed compromise and of the options open to dissenting class members.' [Citation.] The purpose of a class notice in the context of a settlement is to

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understanding that 'an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration.' [Citation.]" (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.) Moreover, it is well established that "IRS private letter rulings have no precedential value. (Int. Rev. Code, § 6110(k)(3).)" (*Airline Pilots Assn. Internat. v. United Airlines, Inc.* (2014) 223 Cal.App.4th 706, 722, fn. 5.)

give class members sufficient information to decide whether they should accept the benefits offered, opt out and pursue their own remedies, or object to the settlement. [Citation.] As a general rule, class notice must strike a balance between thoroughness and the need to avoid unduly complicating the content of the notice and confusing class members. Here again the trial court has broad discretion. [Citation.]" (*Wershba, supra*, 91 Cal.App.4th at pp. 251-252.)

Having reviewed the class notice, we find that the notice clearly informed the class members that acceptance of the settlement benefits (which the notice expressly stated included debt forgiveness) could result in state or federal taxation, depending upon the class member's individual circumstances, and advised class members to seek legal advice regarding tax matters. In light of the statement that the settlement benefits could be subject to taxation, the recognition that individual circumstances can affect tax liability, and the recommendation that legal advice be sought regarding tax matters, we find that the class notice succeeded in striking a balance between thoroughness and the avoidance of undue complication and confusion regarding tax consequences. (See *Wershba, supra*, 91 Cal.App.4th at pp. 251-252.)

We also find that the class notice clearly informed the class members that they had the right to decide not to accept the settlement benefits and to opt out, and the right to object to the settlement, and provided the procedures for doing so. Since the class notice advised the class members of their benefits and rights under the proposed settlement, as well as the potential for state or federal taxation of settlement benefits and their right to opt out or object, we determine that the class notice satisfied due process. (See *Phillips Petroleum*, *supra*, 472 U.S. at pp. 811-812.)

Trujillo and Riley additionally argue that the settlement is unfair that because the class notice or other language in the settlement agreement fails to inform the class members that they have a duty to self-report debt forgiveness to the IRS. We are not convinced because they have provided no authority for the proposition that giving such tax advice to class members is an obligation of class counsel or the defendant in a class action settlement.

We therefore determine that the trial court did not abuse its discretion in finding that the class notice in this case adequately informed the class members of the potential tax consequences of accepting the settlement benefits.

D. *Section 1542 Waiver*

Section 1542 provides: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

In this case, both releases in the class action settlement agreement include a waiver of all rights under section 1542. The first release applies to class members who are not class representatives and states in part: "All Settlement Class members who do not request exclusion as set forth herein shall and hereby do release any and all claims, liens, demands, causes of action, obligations, damages, and liabilities, known or unknown, that they have or may have against Ally . . . ; this release includes any claims arising out of Ally's sending of a post-repossession NOI, the content of that NOI, the assertion of a Deficiency Balance following repossession, the collection or attempted collection of the deficiency, and the reporting to Credit Reporting Agencies of the amounts remaining on the account after repossession. The Settlement Class Members expressly understand and acknowledge that it is possible that unknown losses or claims exist or that present losses may have been underestimated in amount or severity. . . . Consequently, the Settlement Class Members expressly waive all rights under [section] 1542 . . . ." The narrower release that applies to class representatives similarly states that "the Class Representatives and Ally expressly waive all rights under [section] 1542 . . . ."

We understand Trujillo and Riley to contend that the trial court abused its discretion in approving a settlement that is unfair because it includes a release of unknown claims against Ally arising from the defective NOIs while imposing tax liability on the class members. They assert that the Rileys and the "thousand of other class members" who received "1099s *30 days before* Final Approval" will not be able to challenge the validity of the NOIs and thereby avoid tax liability.[7] Additionally, Trujillo and Riley contend that the class action was strong on the merits and therefore a section 1542 waiver is unwarranted.

Class counsel dispute the assertion that the settlement agreement is unfair because the release includes a typical section 1542 waiver. They point out that class members could opt out if they did not want to agree to the release. Additionally, Ally argues that the release does not preclude class members from challenging the IRS's determination of their tax liability, since the IRS is not a party to the settlement.

The standard of review for the trial court's determination that a class action settlement is fair and reasonable is abuse of discretion. (*Wershba*, *supra*, 91 Cal.App.4th at pp. 234-235.) As in *Wershba*, "[f]irst, we emphasize that 'the merits of the underlying class claims are not a basis for upsetting the settlement of a class action.' [Citations.] The proposed settlement is not to be judged against a hypothetical or speculative measure of what might have been achieved had plaintiffs prevailed at trial. [Citation.]" (*Id.* at p. 246.) "Compromise is inherent and necessary in the settlement process. Thus, even if 'the relief afforded by the proposed settlement is substantially narrower than it would be if the suits were to be successfully litigated,' this is no bar to a class settlement because 'the public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation.' [Citation.]" (*Id.* at p. 250.)

[7] Trujillo and Riley did not provide a record cite to any evidence showing that thousands of class members had received an IRS form 1099 relating to this class settlement.

Accordingly, we find no merit in the contention that the strength of the merits of the class action claims precludes a section 1542 waiver in the settlement release.

Second, it is well established that "[a] general release—covering 'all claims' that were or could have been raised in the suit—is common in class action settlements. [Citation.]" (*Carter v. City of Los Angeles* (2014) 224 Cal.App.4th 808, 820-821; see also *Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 587 (*Villacres*).) Thus, " '[a] judgment pursuant to a class settlement can bar [subsequent] claims based on the allegations underlying the claims in the settled class action. This is true even though the precluded claim *was not presented,* and *could not have been presented,* in the class action itself.' [Citations.]" (*Villacres*, *supra*, at pp. 586-587.) Trujillo and Riley have not provided any authority for the proposition that a section 1542 waiver of all claims that were or could have been raised in the present class action renders the settlement unfair where the acceptance of the settlement benefits may, as stated in the class notice, subject a class member to tax consequences.

Trujillo and Riley also argue, for the first time in their reply brief, that the settlement should not be approved as fair because class counsel conducted insufficient discovery regarding the IRS form 1099s that were sent to class members. Since they raise this issue for the first time on appeal, we will disregard it. Appellate courts ordinarily will not consider new issues that are raised for the first time in the appellant's reply brief as the respondent has no opportunity to counter such contentions. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764-765.)

E. *Riley's Request for Exclusion*

Finally, to the extent Riley argues that the trial court erred in failing to grant his request for opt out and exclusion from the class action settlement at the time of the March 25, 2014 hearing on the motion for final approval of class action settlement, we will address the issue.

To determine the applicable standard of review, we may look to the federal courts for guidance in the absence of any California appellate decisions on point. "As a general rule, California courts are not bound by the federal rules of procedure but may look to them and to the federal cases interpreting them for guidance or where California precedent is lacking. [Citations.]" (*Wershba, supra*, 91 Cal.App.4th at pp. 239-240.) The federal courts have determined that the standard of review for an order denying a class member's request to opt out or to be excluded from the class is abuse of discretion. (See, e.g., *Ayers v. Thompson* (5th Cir. 2004) 358 F.3d 356, 368; *Snell v. Allianz Life Ins. Co. of North America* (8th Cir. 2003) 327 F.3d 665, 669.)

We agree with Ally that the trial court did not abuse its discretion in denying Riley's request for opt out and exclusion from the class action settlement. Riley filed his request on March 24, 2014, which was the day before the March 25, 2014 hearing on the motion for final approval of class action settlement. The trial court denied Riley's request for opt out and exclusion during the hearing, finding that the request was untimely. The court also found that Riley had "decided to affirmatively participate in the settlement by filing a claim form. And it's prejudicial to Ally for him now supposedly to sort of try to change his mind after the tentative ruling was issued yesterday and after the deadline to even contest the tentative ruling expired."

Riley asserts that he could not file his request until five months after the September 2013 deadline because the class notice did not inform him about his tax liability and he did not receive an IRS form 1099 regarding Ally's cancellation of debt until sometime after February 18, 2014. However, the record reflects that class notice was mailed to the class members in June 2013 and Riley filed a claim form thereafter. As we have discussed, the class notice adequately informed the class members that the settlement benefits might be taxable and recommended that class members seek legal advice on tax matters.

Since Riley has not provided a convincing reason for his failure to file his request for opt out and exclusion at any time sooner than the day before the March 25, 2014 hearing on the motion for final approval of the class action settlement, we determine that the trial court did not abuse its discretion in denying his request for opt out and exclusion from the class action settlement.

IV. DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondent.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.

Ally Financial Inc. v. Lazrovich
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